BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

TURLOCK UNIFIED SCHOOL DISTRICT AND MODESTO CITY SCHOOLS.

OAH CASE NUMBER 2019081052

ORDER GRANTING IN PART AND DENYING IN PART MODESTO'S MOTION TO SQUASH SUBPOENAS DUCES TECUM

On August 27, 2019, Student filed a due process hearing request naming Turlock Unified School District and Modesto City Schools. On September 16, 2019, the Office of Administrative Hearings, known as OAH, granted Student's request to file a first amended complaint.

On November 25, 2019, Student issued a subpoenas duces tecum on Mark Herbst, Modesto's assistant superintendent, and on Modesto's custodian of records. Both subpoenas request the same records from Modesto.

On December 4, 2019, Modesto filed a motion to quash the subpoenas asserting they are overbroad and vague because there is no discernable relationship to

the allegations in the first amended complaint, and also because it is an impermissible attempt at discovery in the special education proceeding.

APPLICABLE LAW

A party to a due process hearing under the Individuals with Disabilities in Education Act has the right to present evidence and compel the attendance of witnesses in "a hearing conducted pursuant to subsection (f) or (k)" of section 1415 of title 20 of the United States Code. (20 U.S.C. § 1415(h); see also Ed. Code, § 56505, subd. (e).)

Pre-hearing discovery in special education cases at the administrative hearing stage is limited. Parents or adult students are entitled to request copies of the educational records, relating to the student in question, that are maintained by the school district. (Ed. Code, § 56504; *Burnett v. San Mateo Foster City School District,* (9th Cir. 2018) 739 Fed. Appx. 870, 873.) The parties are also entitled to disclosures of any evidence an opposing party plans to introduce at hearing 5 business days prior to the date of the first day of hearing. (Ed. Code, 56505(e)(7).)

In special education proceedings in California, "[t]he hearing officer shall have the right to issue Subpoenas (order to appear and give testimony) and Subpoenas Duces Tecum (order to produce document(s) or paper(s) upon a showing of reasonable necessity by a party)." (Cal. Code Regs., tit. 5, § 3082, subd. (c)(2).) This requirement mirrors that required by Code of Civil Procedure section 1985, subdivision (b), which requires:

> A copy of an affidavit shall be served with a subpoena duces tecum . . ., showing good cause for the production of the matters and things described in the subpoena, specifying the exact matters or things desired to be produced, setting forth in full detail the materiality thereof to the issues involved in the case,

and stating that the witness has the desired matters or things in his or her possession or under his or her control.

The good cause requirement is met by a factual showing of why the requested documents or things are material and relevant to the litigated issues. (*Johnson v. Superior Court* (1968) 258 Cal. App.2d 829, 835-836; see also *Seven Up Bottling Company v. Superior Court* (1951) Cal. App.2d 71, 77.)

Special education law does not specifically address motions to quash subpoenas or subpoenas duces tecum. In ruling on such motions, OAH relies by analogy on the relevant portions of the Code of Civil Procedure. Code of Civil Procedure section 1987.1 provides that a court may make an order quashing a subpoena entirely, modifying it, or directing compliance with it upon such terms or conditions as the court shall declare, including protective orders.

DISCUSSION

On November 25, 2019, Student sought documents through two subpoena duces tecum directed at Mark Herbst, Modesto's Associate Superintendent, and the custodian of records, to be produced at the commencement of the due process hearing.

In the subpoenas, Student requests any and all communications (i.e. email, text messages, recorded interviews, phone messages) by any Modesto City Schools employee related to her held by it from 2014 through the present date. Specifically, Student requests all communications related to Student's individualized education program development, placement, assessment, behavior supports, home or home hospital instruction, and academic instruction. Student further states that the documents sought are not considered student records, and she is not seeking documents that are protected by the attorney client privilege.

Student's declaration in support of the subpoenas states that the documents sought are material to the proper presentation in the case. Further, the documents are reasonably necessary for Student to present evidence on the issues raised in the complaint. Conversely, Modesto argues that the subpoenas duces tecum are overbroad, and immaterial to the issues in this matter and should be quashed.

The motion to quash the subpoena duces tecum directed at Mark Herbst is granted. Student's declaration gives no information as to how this Modesto employee is related to this case and how documents in his possession are relevant. In fact, Mark Herbst is not listed in Student's or Modesto's prehearing conference statements as a witness in this matter. Thus, Student failed to establish that documents requested from Mark Herbst are a reasonable necessity.

Modesto's objection as to documents from the custodian of records is granted in part. Student contends in her first amended complaint that Modesto denied Student a free appropriate public education for the 2014-2015 school year through the 2016-2017 school year. Student fails to establish that documents from the 2017-2018 school year to the present are material or relevant as it relates to Modesto. Thus, Modesto's motion to quash the subpoenas duces tecum after the 2016-2017 school year, including the extended school year, is granted.

Additionally, it can easily be presumed that communications related to Student's individualized education program development, placement, assessment, behavior supports, home or home hospital instruction, and academic instruction are at issue in this matter and are potentially relevant as to whether Modesto provided her with a free appropriate public education. The custodian or records, however, is not required to produce phone messages or text messages, as these requests are overbroad, and more akin to discovery requests which are not authorized in special education due process

hearings.

ORDER

1. Modesto's motion to quash Student's subpoena duces tecum as to Mark Herbst is granted.
2. Modesto's motion to quash Student's subpoena duces tecum as to the custodian of records is granted in part and hereby modified. Student's request is limited to the 2014-2015 school year through the 2016-2017 school year, including extended school year. The custodian of records is not required to produce phone messages or text messages as to any Modesto employee.
3. Modesto shall deliver Student's records to the hearing location in this matter at 9:30 a.m. on December 17, 2019.
2. Counsel for Student shall immediately serve a copy of this order on Modesto and on the school site from which documents would be found.

DATED: December 13, 2019

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Cynthia Fritz
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Cynthia Fritz
Administrative Law Judge
Office of Administrative Hearings